IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 02-3010

INTERACTIVE DIGITAL SOFTWARE ASSOCIATION, *et al.*,

Plaintiffs-Appellants,

v.

ST. LOUIS COUNTY, MISSOURI, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
For the Eastern District of Missouri, Eastern Division, No. 4:00CV2030 SNL
The Honorable Stephen N. Limbaugh, Senior District Judge

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, ASSOCIATION OF AMERICAN PUBLISHERS, INC., FREEDOM TO READ FOUNDATION, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, MOTION PICTURE ASSOCIATION OF AMERICA, INC., PUBLISHERS MARKETING ASSOCIATION, AND RECORDING INDUSTRY ASSOCIATION OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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STATEMENT

American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., Freedom to Read Foundation ("FTRF"), International Periodical Distributors Association, Motion Picture Association of America, Inc. ("MPAA"), Publishers Marketing Association, and Recording Industry Association of America ("RIAA") submit this *amicus* brief in support of appellants, urging that this Court find St. Louis County Ordinance No. 20,193 (Oct. 26, 2000) ("the Ordinance) unconstitutional and, therefore, reverse the decision of the court below.[1] This brief is submitted upon written consents, attached hereto, of counsel to both appellants and appellees.

INTEREST OF *AMICI*

Amici's members (hereinafter "*amici*") publish, produce, distribute, sell and are consumers of books, magazines, videos, sound recordings, and printed materials of all types, including materials that are scholarly, literary, artistic, scientific and entertaining. Libraries and librarians represented by FTRF provide such materials to readers and viewers.

The materials published, distributed and sold by *amici* include depictions of "graphic violence" as defined by the Ordinance. These range from popular motion pictures such as "The Terminator," "Rambo" and "Platoon," starring well known

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[1] A description of the *amici* is attached as Appendix A.

actors such as Arnold Schwarzenegger, Sylvester Stallone and Charlie Sheen, to documentaries about wars and the Holocaust. These expressive materials are and should be protected by the First Amendment. Based on the reasoning of the Court below, were this Court to affirm the decision below, such materials would be subject to regulation based on their content, thus substantially chilling activities of *amici* that heretofore have been clearly protected by the First Amendment. *Amici* have a significant interest in ensuring that the body of law regarding "harmful to minors" speech on sexual matters not be wrongly applied to graphic violence, and that it not be extended to restrict protected speech which legislators believe is emotionally harmful to youth.

The district court's holding that violent material can be regulated "1) to protect the physical and emotional health of the children in St. Louis County, and 2) to assist parents to be the guardians of their children's well-being," *Interactive Digital Software Ass'n v. St. Louis County, Missouri*, 200 F. Supp. 2d 1126, 1141 (E.D. Mo. 2002), even if it is "speech" carves an enormous new exception into the First Amendment bedrock upon which *amici* depend for the creation and dissemination of a wide variety of constitutionally protected material in all media. It represents a dramatic departure from settled constitutional law, with implications far beyond the factual setting of this case. It places at risk a staggering array of mainstream films, videos, television programs, books, magazines, and works in

other media that contain violent imagery no more shocking than that available every day on the news. The current violence in the Middle East, for example, is gruesome, gut-wrenching, and tragic, but it is real, and few would contend that it should be excised from the media to spare the sensibilities of minors. Likewise, the realistic violence in movies like "Saving Private Ryan" or in books about the Civil War and World War II should not be denied full constitutional protection because some fear its effect on minors.

Amici believe that we do ourselves, our children, and the First Amendment a grave disservice by allowing the government, based on deeply flawed studies, to regulate material that has hitherto enjoyed full constitutional protection. Rather than allowing the mantra "harmful to minors" to shield from meaningful judicial scrutiny restrictions on any speech that lawmakers deem unsuitable for children, this Court should reaffirm the consistently recognized holding that communications including descriptions or depictions of violence retain the protection of the First Amendment.

Amici have, to date, been comfortable with the existing constitutional "variable obscenity" framework so long as the access of adults to speech that is constitutionally protected as to them is not impaired. But however carefully the drafters of the Ordinance hewed to *Ginsberg v. New York*, 390 U.S. 629 (1968), the decision below erroneously sanctions the extension of the carefully crafted

doctrine of variable obscenity to violent materials. If not reversed, it surely will inspire even broader restrictions on violent content, thereby chilling the creation and dissemination of a huge amount of mainstream speech that contains at least some "graphic violence." The effect on *amici* will be profound, with dire consequences for the vibrant dialogue the First Amendment was intended to foster. The First Amendment is gravely weakened, and the communicative businesses of *amici* adversely impacted, when courts defer so readily to legislative efforts to sanitize the world to which minors are exposed.

An additional flaw in the Ordinance is its incorporation of ratings issued by private voluntary associations into the criminal construct. *Amici* MPAA and RIAA also use ratings in connection with their members' communicative products. Not only is the incorporation an unconstitutional delegation, but it will discourage future use of such ratings, depriving parents of the assistance they provide.

In the past, many of the *amici* have brought actions in both federal and state courts to assert the unconstitutionality of laws infringing on First Amendment rights. *See, e.g., Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999), *aff'g* 4 F. Supp. 2d 1029 (D.N.M. 1998); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992); *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); *American Library Ass'n v. Pataki*, 969 F.

Supp. 160 (S.D.N.Y. 1997); *Village Books v. Bellingham*, No. C88-1470 (W.D. Wash. Feb. 9, 1989); *American Booksellers Ass'n, Inc. v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993); *Leech v. American Booksellers Ass'n, Inc.*, 582 S.W.2d 738 (Tenn. 1979).

I.
THERE IS NO BASIS FOR THE DISTRICT COURT'S UPHOLDING RESTRICTIONS ON MATERIAL DEPICTING "GRAPHIC VIOLENCE"

In defiance of all applicable precedents both in this Circuit and elsewhere, the district court upheld the Ordinance by creating a new exception to the First Amendment for "graphic violence."[2] In doing so, the district court wrongly denied First Amendment protection to certain expressions of violent action conveyed to persons under eighteen.

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[2] The district court found that games are not speech. *Amici* endorse appellants' argument as to the incorrectness of that conclusion. It is particularly strange to hold the games not to be speech and, at the same time, to hold that their content harms minors.

A. Expression of Violent Action Is a Protected Form of Speech and Any Content-Based Regulation of Such Speech Must Pass Strict Scrutiny

There is no constitutional basis for regulation of "graphic violence." The depiction or description of violence is not one of the few narrowly delineated categories of speech excluded from the protection of the First Amendment:

> The traditional categories of speech subject to permissible government regulation include "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942). In addition, the Supreme Court has recently upheld legislation prohibiting the dissemination of material depicting children engaged in sexual conduct. *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982).

American Booksellers Ass'n, Inc. v. Hudnut, 598 F. Supp. 1316, 1331 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

Every court, including this Court, that has considered the issue (other than the court below and a judge in the Southern District of Indiana whose decision was reversed by the Seventh Circuit) has invalidated attempts to regulate material solely based on violent content, regardless of whether that material is called "violence," "excess violence" or included within the definition of "obscenity." *See, e.g., Winters v. New* York, 333 U.S. 507, 508, 510 (1948) (First Amendment protects pictures and descriptions of "deeds of bloodshed, lust or crime");

A*merican Amusement Mach. Ass'n v. Kendrick*, 244 F.2d 572 (7th Cir. 2001); *Video Software Dealers Ass'n. v. Webster*, 968 F.2d at 684 (8th Cir. 1992) ("[V]ideos depicting only violence do not fall within the legal definitions of obscenity for either minors or adults."); *Eclipse Enterprises Inc. v. Gullota*, 134 F.2d 63 (2d Cir. 1997) (declining "any invitation to expand these narrow categories of speech to include depictions of violence"); *American Booksellers Ass'n v. Hudnut*, 771 F.2d at 330; *Interstate Circuit Inc. v. City of Dallas*, 366 F.2d 590 (5th Cir. 1966), *vacated on other grounds*, 391 U.S. 53 (1968).

As the trial court recognized, content-based regulation of violent expression such as the Ordinance must pass strict scrutiny – *i.e.*, it must "promote a compelling interest" and use the "least restrictive means to further the articulated interest." *Sable Communications, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). Moreover, even if the state has a compelling interest, the regulation must be "carefully tailored" to achieve the stated purpose. *Id*. Properly applied, the Ordinance fails to pass strict scrutiny.

B. First Amendment - Protected Communications Cannot Be Restricted Based on Their Emotional or Psychological Impact

In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Supreme Court adopted the concept of "variable obscenity" or "obscenity for minors," which was subsequently engrafted onto the three-part obscenity test set forth in *Miller v. California*, 413 U.S. 15 (1972). The *Ginsberg/Miller* analysis rests on the fact that "obscenity is not within the area of protected speech." *Ginsberg*, 390 U.S. at 635, *citing Roth v. United States*, 354 U.S. 476, 485 (1957). Both *Ginsberg* and *Miller* involved the regulation of obscene materials – materials that have a "specific judicial meaning which derives from the *Roth* case, i.e., obscene material 'which deals with sex.'" *Miller v. California*, 413 U.S. 15, 20 n.2 (1973), *citing Roth*, 354 U.S. at 487.[3] Obscene sexual material, not violent material, has been held unprotected by the First Amendment for almost 50 years[4] -- and thus may be constitutionally regulated.

The Ordinance, by its terms, appears to extend the *Ginsberg/Miller* test to violent matter. The trial court, recognizing that this Court has previously correctly

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[3] The *Miller* Court further stated that "[u]nder the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed." *Id.* at 27 (emphasis added).

[4] *Roth v. United States*, 354 U.S. 476 (1957).

rejected such an extension *(See Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992)), adopts the expression "harmful to minors" in its more common everyday meaning, finding (without any citation) that "continued exposure to violence is harmful to minors." 200 F. Supp. 2d at 1137. Since the "County can rely on society's accepted view," *id.*, the Court finds the "County has compelling interests in regulating the distribution of violent video games to minors." *Id*. at 1138.

First amendment protected speech cannot be restricted based on its emotional or psychological impact on some readers or game players. As Justice Kennedy said earlier this year in *Free Speech Coalition v. Ashcroft*, 122 S. Ct. 1382 (2002),

> Congress may pass valid laws to protect children from abuse, and it has. E.g., 18 U.S.C. §§ 2241, 2251. The prospect of crime, however, by itself does not justify laws suppressing protected speech. ("Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech") (internal quotation marks and citation omitted). It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities.

Id. at 1399. *See also American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985).

> Racial bigotry, anti-semitism, violence on television, reporters' biases - these and many more influence the culture and shape our socialization. None is directly

> answerable by more speech, unless that speech too finds its place in the popular culture. Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.

771 F.2d at 330. Neither of these precedents were even mentioned by the district court.

Neither *Ginsberg* nor any other Supreme Court decision opens the door to permit government to limit minors' First Amendment rights to a category of speech whenever government believes that it will protect the emotional and physical harm of children and assist parents in guarding their children's well-being. Minors are within the penumbra of the First Amendment. Such a slippery slope would obviate the First Amendment rights of minors. Rather, "harmful to minors" is merely the formulation used by the New York legislature to define obscenity for minors in the statute under consideration in *Ginsberg*. It has nothing to do with actual harm, emotional or physical, to a minor.

This Court should reject the reasoning of the district court and conclude, as has every other appellate court to have addressed the issue of regulation of violent content, that regulation of material based solely on its description or depiction of violent action is unconstitutional.

II.
EVEN IF RESTRICTING ACCESS TO MATERIAL WITH VIOLENT CONTENT WERE PERMISSIBLE, BARRING OLDER MORE MATURE MINORS BASED ON THE INAPPROPRIATENESS OF THE MATERIAL TO YOUNGER MINORS IS CONSTITUTIONALLY UNACCEPTABLE

The decision of the district court bars access to constitutionally protected materials by older minors to "protect" younger children. However, the relevant decisions, in which a number of *amici* were plaintiffs, are to the contrary. *American Booksellers Ass'n, Inc. v. Virginia*, 882 F.2d 125, 127 (4th Cir. 1989), *on remand from* 488 U.S. 905 (1988); *American Booksellers v. Webb*, 919 F.2d 1493, 1505 (11th Cir. 1990); *Davis-Kidd Booksellers, Inc.*, 866 S.W.2d at 520.

Concerned as to the application of the *Ginsberg* test in the context of an access restriction rather than a restriction on sale, the Supreme Court, in *Virginia v. American Booksellers Ass'n, Inc.*, requested the Virginia Supreme Court to advise it "what general standard should be used in determine the statute's reach in light of juveniles' differing ages and levels of maturity." 484 U.S. at 398. To comply with the U.S. Constitution, the Virginia Supreme Court developed the rule quoted and rejected by the district judge here, namely that "if a work is found to have serious literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents, then it cannot be said to lack such value for the entire class of juveniles taken as a whole." 882 F.2d at 126 (quoting *Virginia v. American*

Booksellers Ass'n, Inc., 372 S.E.2d 618, 624 (Va. 1988)). The Ordinance failed to make any distinction, thus applying a single standard — that of a younger, less mature child — to restrict all children. This is yet another reason to reverse the decision below.

III.
THE ORDINANCE'S TEST IS UNCONSTITUTIONALLY VAGUE

"Where a statute imposes criminal penalties, the standard of certainty is higher." *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983). As the Supreme Court stated in *Grayned v. City of Rockford*, a law is void for vagueness under the due process clause of the Fifth Amendment if its prohibitions are not clearly defined. 408 U.S. 104, 108 (1972). The Court provided the following extensive explanation of the three reasons why a vague law is unconstitutional:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly . . . . Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statue 'abut(s) upon sensitive areas of basis First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of

> the unlawful zone' . . . . than if the boundaries of the forbidden areas were clearly marked.

Id. at 108-109 (footnotes omitted); s*ee also Smith v. California,* 361 U.S. 147, 151 (1959) ("[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the lower.")

If the Court affirms the graphic violence/harmful to minors formula for the regulation of violent video games in public arcades, there would be no legal impediment to its application to other expressive media, such as those represented by *amici*. Contrary to the holding of the trial court, the potential application of the St. Louis test to the vast panoply of the materials *amici* produce gives rise to acute concern regarding the lack of any reasonably certain objective meaning for the Ordinance's operative terms:

3. What is a minor's "morbid interest" in violence? What does morbid mean in this context? Webster's Third New International Dictionary offers three definitions: not sound and healthful; abnormally susceptible to or characterized by gloomy or unwholesome feelings; or grisly and gruesome. Each of these definitions implicates the subjective response of the observer of the material. How does an artist, publisher or producer know whether material predominantly

appeals to such a “morbid interest”, even if they had a clear understanding of the meaning of “morbid interest”?

4. The definition of “graphic violence” raises questions as to the meaning of “human-like being” and “bloodshed”, among other words.

The language of the Ordinance provides no opportunity for people, such as those represented by the *amici*, to determine whether a certain material falls under its criminal ambit. Further, because the definitions are so subjective, it is quite conceivable that a person may be criminally charged if an official vested with the right to enforce the Ordinance or similar legislation believes that the material appeals to a “morbid” interest. As a direct result of the quintessentially vague language, such legislation will have a chilling effect on distributors and others who deal with mainstream, valuable works. The Supreme Court has noted that “[u]ncertain meanings” inevitably lead citizens to “ ‘steer far wider of the unlawful zone’ . . . . than if the boundaries of the forbidden areas were clearly marked.” *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

IV.
THE ORDINANCE IMPROPERLY DELEGATES LEGISLATIVE POWER

The Ordinance establishes a "rebuttable presumption" that video games rated "M" or "AO" by the Entertainment Software Rating Board ("ESRB") or "red" in the arcade rating systems are subject to sanction as "harmful to children." These designations, developed privately and without any legislative direction, are incorporated directly into the Ordinance as standards of harmfulness to children in a manner that constitutes an unconstitutional delegation of legislative power. In addition, the Ordinance improperly shifts the burden of proof of compliance to a defendant. Legislative standard setting thus delegated also cripples the capacity of the Ordinance to serve its asserted purpose because it creates an incentive in the video game industry either to relax its code definitions or even to eliminate them entirely.

A. The "Rebuttable Presumption" in the Ordinance is as Invalid as an Express Prohibition.

The incorporation of private ratings into criminal statutes has been repeatedly found to be constitutionally unacceptable. *See, e.g., Drive In Theatres, Inc. v. Huskey*, 305 F. Supp. 1232 (W.D.N.C. 1969), *aff'd* 435 F.2d 228 (4th Cir. 1970); *Motion Picture Association of America v. Specter*, 315 F. Supp. 1133 (E.D. Wisc. 1970); *Engdahl v. City of Kenosha*, 317 F. Supp. 1133 (E.D. Wisc. 1970). Contrary to the holding of the Court below (200 F. Supp. 2d at 1141), the U.S. Supreme Court has held that an enforcement scheme which gives even an implied legal effect to standards set outside the state's own criminal regulation of illegal conduct is just as improper as express adoption of those standards. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

In *Bantam*, the Supreme Court considered activities of a state "Commission to Encourage Morality in Youth," which compiled and circulated lists of "objectionable" publications. 372 U.S. at 59, n.1. The Commission's lists created no express presumption, rebuttable or otherwise, that distributors of the listed publications were subject to criminal sanction under state obscenity laws. Yet the Supreme Court still found the coercive and inhibiting effect of the Commission's non-reviewable designations unacceptable, even though actual sanctions could only come after a trial. 372 U.S. at 67.

Similarly, simply because a presumptive violator is entitled to a trial does not mean the County has not impermissibly delegated legislative power. Since "M", "AO" or "red" -designated games are presumed to be "harmful to children," game exhibitors' rights will be chilled as they adjust their conduct accordingly. State power has thus been effectively exerted under the non-reviewable private standards. Indeed, exerted more effectively than in *Bantam Books*, where the seller of an "objectionable" publication was entitled to a presumption that the publication was not illegal.

B. The "Rebuttable Presumption" Impermissibly Shifts the Burden of Proof of Compliance to a Defendant.

The Ordinance establishes a presumption of violation of its standard of harm to minors, resulting in criminal liability, for any video game coded "M", "AO" or "red." A defendant accused of violating the Ordinance may rebut this presumption at trial. This is similar to the scheme struck down in *Engdahl v. Kenosha,* 317 F. Supp. 1133 (E.D. Wisc. 1970). In *Engdahl*, movies classified by an industry rating agency as unsuitable for minors were prohibited to minors under town law unless a film distributor persuaded a statutory Board of Appeals that the film did not violate standards set out in the law. The court in *Engdahl* held that use of the standards did not "meet the constitutional requirements." 317 F.Supp. at 1136.

The *Engdahl* decision, and the U.S. Supreme Court precedent upon which it rested, *Freedman v. Maryland,* 380 U.S. 51 (1965), both involved prior restraint of

protected expression. But their holdings as to the proper placement of the burden of proof are applicable here. It is settled law, indeed it is axiomatic to our entire system of criminal justice, that every defendant is entitled to a trial in which the prosecution must prove each and every element of the crime charged. Yet a defendant under the Ordinance where the game giving rise to the charge carried an "M", "AO" or "red" rating would enter the courtroom presumed guilty of the key element, that the game at issue was harmful to children.

C. The Finding of the District Court That, Since the Delegation Was To "Those Affected by the Ordinance," It Was Not Improper, is Not Supportable.

The District Court erroneously dismissed the argument that the Ordinance improperly delegated legislative power on grounds that cases cited at trial by Plaintiff/Appellants involved delegation of "broad discretion to judges, juries, and police officers, not to those affected by the Ordinance." This unsupported statement is wrong on two counts.

First, the Ordinance is not a grant of "broad discretion" to the industry rating agencies. Rather it presumes guilt based on the agencies' rating designations. Second, the wrongfulness of a delegation of power does not depend on the identity of the delegee. *See, e.g., Washington ex rel Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), *Potter v. State*, 509 P.2d 933 (Okl. Crim. App. 1973).

As the *Potter* opinion explained, courts have approved delegation of authority for making rules or defining terms to administrative bodies where such bodies are given legislative standards to follow in developing or enforcing regulatory provisions. 509 P.2d at 934; s*ee also S.C. State Hwy. Dept. v. Harbin*, 226 S.C. 585, 594 (S.C. 1955). But here, the industry ratings pre-date the Ordinance, the rating agencies are private, and the County does not even argue that the agencies are witting participants in the County's enforcement scheme.

The holding by the Court below that legislative power to determine harmfulness could be effectively delegated to a private rating agency by simply incorporating the agency's ratings into a criminal statute was a striking doctrinal announcement with no supporting case citation. There are none.

D. Incorporation of the Voluntary Ratings Into a Criminal Statute Undermines the Asserted Purpose of the Ordinance.

The purpose of ratings is to assist the industry's customers in more knowledgeable purchasing of their products. As the ESRB web site describes, it is "to help you to decide which games are right for your home." http://www.esrb.org (last visited Sept. 24, 2002). By incorporating the ratings into a criminal statute, the Ordinance creates an incentive for the rating agencies either to relax their standards or even eliminate them altogether. The effect would be exactly the opposite of what the County intended in promulgating the Ordinance.

The purpose of the Ordinance is to inhibit access by a class of customers (children) to a class of products identified under a harmfulness standard legislated by the County. If upheld, one effect of the Ordinance would be to undermine the intended function of the rating systems by inhibiting access by some customers to some games without a finding by any duly constituted authority that those games actually violate the legislated standard. The County should not be surprised when the industry concludes that the ratings, thus co-opted and turned against their creators, should either be weakened or eliminated. There is nothing to prevent the industry from doing either.

The likely result would be a video game market in which parents and children receive no industry guidance toward age-appropriate games, or receive guidance that varies ever more widely from the County standard. This Court should avert such an outcome by voiding the Ordinance.

CONCLUSION

By reason of the foregoing, *amici* respectfully urge this Court to reverse the order below and instruct the district court to enjoin enforcement of the Ordinance.

Dated: September 25, 2002

Respectfully submitted,

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APPENDIX A: THE *AMICI*

American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

Association of American Publishers, Inc. ("AAP") is the national association in the United States of publishers of general books, textbooks and educational materials. AAP's approximately 300 members include most of the major commercial book publishers in the United States, and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of the general, educational and religious books and materials produced in the United States.

Freedom to Read Foundation ("FTRF") is an organization established in 1969 by the American Library Association to promote and defend First Amendment rights, support the rights of libraries to include in their collections and make available to the public any work they may legally acquire, and help shape legal precedent for the freedom to read on behalf of all citizens.

International Periodical Distributors Association is the trade association for the principal national distributors engaged in the business of distributing or

arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

Motion Picture Association of America ("MPAA") is a not-for-profit corporation founded in 1922 for the purpose of promoting the interest of the motion picture industry in the United States and helping the industry maintain high standards and public goodwill.

Publishers Marketing Association ("PMA") is a trade association representing more than 3,000 publishers across the United States and Canada. Many of PMA's members are small, independent publishers who publish a variety of works, including many concerning controversial topics or involving experimental approaches to writing, which more mainstream publishers have not acquired.

Recording Industry Association of America, Inc. ("RIAA") is a trade association whose member companies produce, manufacture and distribute over 90% of the sound recordings sold in the United States. The RIAA is committed to protecting the free expression rights of its member companies.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Eighth Circuit Rule 28A(c), the undersigned certifies that this brief complies with the applicable type-volume limitations and that this brief contains 4,246 words, exclusive of the table of contents, the table of authorities, the signature block, the certificates of compliance and service, and the Appendix. (If the Appendix is included in the word count, the brief contains 4,608 words.)

This certificate was prepared in reliance on the word count of the word-processing system used to prepare this brief, Microsoft Word 2000.

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Michael A. Bamberger

Dated: September 25, 2002

CERTIFICATE OF SERVICE

I, Michael A. Bamberger, hereby certify that two copies of the foregoing *Amici* Brief as well as a virus-free diskette (which has been scanned for viruses) containing the full text of the brief, has been served by Federal Express to each of the following individuals:

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